IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2618 of 1994

For Approval and Signature:

HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANSOORALI S ARTIST

Versus

A'BAD MUNICIPAL CORPORATION

Appearance:

1. Special Civil Application No. 2618 of 1994

MR KS ACHARYA for Petitioner No. 1

MR DEEPAK C RAVAL for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 17/06/2004

ORAL JUDGEMENT

1. Mansoorali Shivram Artist, petitioner has filed this petition under Articles 226 and 227 of the Constitution of India, for a writ of mandamus or any other appropriate writ, order or direction with a prayer that this Court may issue appropriate writ asking the respondent not to retire petitioner from 8.3.1994 and be further asked the respondent not to act on the corrected age of 36 years in the fitness certificate but on 34 years of age as correctly shown in the fitness certificate and further after 60 years of age the

petitioner should be retired.

2. The facts giving rise to this petition are as under:-

2.1 The petitioner had joined the service of the respondent Corporation on 5.3.1962 as per the Resolution No.1997 dated 9.3.1962 as a Class-IV employees and he was working as an ad-hoc basis. The petitioner thereafter confirmed as a painter in the year 1972 in Class-IV employee.

2.2 As the petitioner could not produce his birth certificate, the respondent Corporation had sent the petitioner to Sheth L.G.Hospital for the fitness certificate, and as per fitness certificate it was found that petitioner's birth date was 8.3.1936 which has been mentioned in service record in 1972. As the petitioner was Class-IV employee, his retired age is of 60 years and so he is entitled to retire on 8.3.1996.

3. It is a case of the respondent that a Barot Award passed in connection with the difference and dispute between employees of the Corporation and respondent corporation, and pursuant to Barot Award, the respondent Corporation has passed a resolution in 1991. Pursuant to that resolution, the service of petitioner has been converted from Class-IV employee to Class-III employee. It is a case of the respondent Corporation that, as regards age of retirement is concerned, Class-IV employees is of 60 years whereas Class-III employees the age of retirement is of 58 years.

4. It appears that the petitioner was of the view that his date of retirement is 31.3.1996 which has been mentioned in the pay slip earlier, and on the basis of the same the petitioner has filed present petition on 21.2.1994 before this Court contending that he is deemed to be continued in service upto 60 years and, therefore, he may be retired from 1996 and not from 1994. He has, therefore, at the fag end of his career filed a petition before this Court claiming the aforesaid relief.

5. This Court originally issued notice on 23rd February, 1994, however, subsequently on 25th March, 1994, this Court passed following order:

"Learned advocate for the petitioner states that he does not press this petition so far as change of correction in the Birth Date is concerned, with a view to approach Labour Commissioner.

However in light of the award by Hon'ble G.S.Barot, the Corporation has changed the service condition and thereby there is violation of Sec.9-A of I.D.Act. There is also change of category of class of servants. Hence Rule. Interim relief refused."

6. On behalf of the Corporation, affidavit has been filed by one Shri N.P.Patel, City Engineer. Mr.Deepak C.Raval, learned advocate has also appeared on behalf of the Corporation. He has stated that it is no doubt true that petitioner originally belongs to Class-IV employee, his age of retirement is of 60 years, but due to Justice Barot Award, he has been turned into Class-III employee and, therefore, his age of retirement will be considered as 58 years. He further submitted that pursuant to Justice Barot award, the petitioner has accepted the extra emoluments and with all benefits of Class-III employees and, therefore, he has bound by Justice Barot award where the date of retirement is considered as 58 years.

6.1 The learned counsel for the respondent has also invited my attention to the fact that after the interim order passed by this Court, the petitioner has approached the Labour Court for the same relief and the Labour Court by its order dated 2.4.94 did not grant any relief to the petitioner and stated that petitioner is deemed to be retired in 1994 in view of the acceptance of the award of Justice Barot by the Corporation.

6.2 The learned counsel for the respondent has further submitted that, even if it is assumed that petitioner has been right that the date of retirement is wrongly mentioned then normally within five years i.e. from 1972 he ought to have made such grievance against the correction of the birth date but the petitioner at the fag end of his career in 1994 has tried to ventilate this grievance, therefore this Court may not grant any relief to the petitioner in this behalf. For that purpose, he has relied upon the judgment of the Hon'ble Apex Court in the case of Akshaya Restaurant Vs. P.Anjanappa and another reported in AIR 1995 SC 1498 and also another judgment of the Hon'ble Apex Court in the case of Secretary & Commissioner, Home Department and others Vs. R.Kirukaran reported in AIR 1993 SC 2647 where the Hon'ble Apex Court held that when there is a change of birth date and when the petitioner has come at the fag end of service, the court may not give any relief to the petitioner in this behalf.

7. Mr.Mahendra Patel, learned advocate who is appearing on behalf of Mr.K.S.Acharya, learned advocate for the petitioner has stated that petitioner belongs to a painter category, and as the Corporation has already granted relief to other painters and the same has been denied to the petitioner, there is a violation of Article 14 of the Constitution of India. As regards petitioner is concerned, the Corporation ought to have consider all employees together and to that extent the action of the respondent Corporation is not right.

8. Mr.Deepak Raval, learned advocate appearing on behalf of the Corporation stated that the contention of the petitioner is not right whether he is painter or not that may not be considered particularly when originally post of Class-IV employees converted into Class-III employees pursuant to Justice Barot Award, and when the Corporation passed the resolution and higher emoluments were also given to the petitioner as a Class-III employees and the petitioner has accepted the said position, and therefore the contention of the petitioner that he is retired in 1996 instead of 1994 cannot not be accepted in this behalf. He has further stated that there is already award of the tribunal rejecting the contention of the petitioner, that decision has also not been challenged by the petitioner. So in any view of the matter, this Court may not grant any relief to the petitioner on the ground of delay, latches and acquiescence. Thus, the petitioner therefore is not entitled to any relief in this behalf.

9. I have considered rival submissions and judgment of the Hon'ble Supreme Court which has been cited by learned advocate for the respondent. In my view the petitioner is not entitled to any of the relief. Firstly, the date of birth has been shown as 8.3.1936 in the service record in the year 1972, the petitioner has not challenged the said fact till 1994 when he came to know that he has to retire in 1994. Secondly, pursuant to Justice Barot Award, originally petitioner was Class-IV employees and thereafter he has been turned into Class-III employees and age for retirement of Class-IV employees is of 60 years whereas Class-III employees is of 58 years and, therefore, petitioner is entitled to retire in 1994. Thus, once he accepted Justice Barot Award and accepted higher emoluments which is permissible to Class-III employees, it does not lie on the mouth of the petitioner today to say that he has accepted as Class-III employees, but as far as date of retirement is concerned, his age of retirement may be considered as 60 years instead of 58 years. In my view, it is not

permissible in the eye of law that once the petitioner has accepted as Class-III employees and the petitioner has accepted the same in toto and he cannot be accepted at par, in view of the same also the contention of the petitioner is not right. The third contention of the petitioner that he has a painter and therefore he may be continued in service upto 60 years because other persons are also similarly situated who are painters and who are continued upto 60 years by the Corporation. Here a very vague submission made by the petitioner. We do not know the other painters for which the allegation has been made whether they are originally belongs to Class-IV employees and whether Justice Barot Award applicable to them or whether they have accepted the same, and whether they have been continued upto 60 years or 58 years, we are not sure about the said fact in this behalf. If this painters are continued to be remain in Class-IV employees may be continued service upto 60 years, for that the Corporation may not be blame and, therefore, in view of the same, this contention of the petitioner is also not right in this behalf.

10. Mr.Raval, learned advocate for the respondent has also produced the copy of the award where identical contention has been raised and the labour court after elaborating the reasonings rejecting the contention of the petitioner. The petitioner has not challenged the said award either before the labour court or amending the petition challenging the said award. In view of the same, the contention of the petitioner cannot be accepted. Over and above, the petitioner has been retired from service in 1994 and he has also accepted all retirement benefits as a Class-III employee and therefore also in 2004 he cannot make such type of grievance against the same and therefore the contention of the petitioner is liable to be rejected on the ground of delay, latches and acquiescence. I find no substance in the contention of the petitioner. I see considerable force in the contention of the respondent and the affidavit filed by the Corporation because the petitioner has not make any grievance within 5 years regarding date of birth and, therefore, difference and dispute raised by the petitioner at the fag end of his career is also belated and is clearly an after thought and therefore it has no substance.

11. In view of the judgment which has been relied upon by the learned advocate for the respondent, the ratio laid down by the Hon'ble Supreme Court is also applicable to the facts of present case. In view of the same also I do not see that contention of the petitioner

is a bonafide contention. In view of the same, the petition is rejected. Rule is discharged with no order as to costs.

12. I have already seen the original file of the Corporation and now I am returning the original file to Mr.Deepak Raval, learned advocate appearing on behalf the respondent Corporation.

(K.M. Mehta, J.)

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